WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
FEBRUARY, 2013

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Manitowoc
Milwaukee
Oneida
Racine
Waukesha

TUESDAY, FEBRUARY 12, 2013

9:45 a.m. -	11AP691-CR	State v. Matthew R. Steffes
10:45 a.m.-	11AP583	Marilyn M. Brown v. Acuity, A Mutual Insurance Company
1:30 p.m. -	{11AP1176	Joseph McLeod v. Patricia Mudlaff
	{11AP1177	Patricia Mudlaff v. Joseph McLeod

MONDAY, FEBRUARY 25, 2013

9:45 a.m. -	10AP2809-CR	State v. Matthew A. Lonkoski
10:45 a.m.-	09AP2916-CR	State v. Gregory M. Sahs
1:30 p.m. -	11AP2864-CRAC	State v. Samuel Curtis Johnson, III

TUESDAY, FEBRUARY 26, 2013

9:45 a.m. -	12AP665	Manitowoc County v. Samuel J. H.
10:45 a.m.-	12AP99	Outagamie County v. Melanie L.
1:30 p.m. -	11AP1049-D	Office of Lawyer Regulation v. Sharon A. Riek

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 12, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Thomas P. Donegan, presiding.

2011AP691-CR State v. Steffes

This case examines several issues arising from a prison phone-bill scam. The central question before the Supreme Court is whether the electricity used to power a telecommunications service may be considered "tangible property" under Wis. Stat. § 943.20, the state's theft statute.

Some background: Matthew R. Steffes, an inmate at the Waupun Correctional Institution, was found guilty of two counts of conspiracy to commit theft of property exceeding $10,000 in value by fraud.

Steffes' fellow inmate, Joshua Howard, had worked with individuals outside of the prison to acquire phone numbers in fictitious names or "stolen" names. Those telephone lines were known as "burn out" lines because they would eventually be turned off when the telephone company learned that no one would pay for them.

The state presented testimony, recordings of telephone calls, and letters between Steffes and Howard that showed Steffes' involvement in using the "burn out" lines. Steffes claimed that there was no evidence that he had been involved in the conspiracy when the lines were being set up, and that he merely used the lines after they had been acquired by others. In the approximately 18 months between June 2002 and December 2003, Steffes made more than 320 calls on the lines that totaled 6,562 minutes of usage without paying for them.

Although telephone company (SBC) representatives were not able to provide an exact amount and value of electricity used, the total unpaid charges for the calls made on just three of the lines exceeded $26,000. The question of value in any theft case is significant because it determines the category of offense and range of punishment for a particular theft. By valuing the stolen property using the value of the standard charges for the calls, the state succeeded in convicting Steffes of two felonies.

The circuit court imposed concurrent sentences of 24 months of initial confinement and 30 months of extended supervision that were consecutive to Steffes' other sentences. The jury acquitted Steffes of the one charged count of identity theft.

The Court of Appeals affirmed the conviction. It reasoned that the telephone service theft scheme in which Steffes participated was covered by the statute because the defendants were actually stealing the electricity used to power the telephone network, and electricity is expressly included within the statutory definition of property. The theft of services only is not included in the language of the statute.

Steffes has asked the Supreme Court whether the elements of "theft by fraud," contrary to Sec. 943.20(1)(d), Stats., require that the defendant made an affirmative false promise to pay that induced SBC to provide the telephone service. Steffes argues that there was no evidence of a false promise to pay so he could not be convicted of theft by fraud. The Court of Appeals said that the statutory language required only a false representation and did not contain any requirement that there be an express promise of payment to the victim.

Another issue raised by Steffes is whether the trial court erred in instructing the jury as to the elements of "theft by fraud" as alleged in the criminal complaint; and, further, whether defense counsel was ineffective for failing to object to the defective jury instruction. Finally, the case presents the issue of how to value the property that was stolen here.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 12, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Waukesha County Circuit Court decision, Judge Donald J. Hassin, presiding.

2011AP583 Brown v. Acuity

This insurance case arises from an automobile collision involving a volunteer firefighter who ran a red light in his personal car while responding to the station for a call. The Supreme Court has been asked to examine whether driving by a volunteer firefighter on the way to the fire station in response to a call is a discretionary activity, entitling the firefighter to government immunity from tort liability.

Some background: Parnel P. Burditt was a volunteer firefighter and a lieutenant for the Okauchee Fire Department (OFD). He also served as Emergency Medical Services director.

On a dark and rainy evening, Burditt responded to a dispatch from the fire department in his personal vehicle, which was equipped with emergency lights but no siren. Burditt's emergency lights were activated when he entered a traffic intersection against a red light, eventually colliding with a vehicle driven by Frank Brown. The collision injured Marilyn Brown and Delores Schwartz, passengers in Frank Brown's vehicle.

Marilyn Brown and Schwartz (collectively, "Brown") sued Burditt, the OFD, and their insurers, alleging that Burditt's negligence was a substantial factor causing the collision. Burditt moved for summary judgment, arguing that he was immune from personal liability for the accident pursuant to Wis. Stat. § 893.80(4) because he was acting within the scope of his duties for the fire department when the accident occurred. The trial court granted summary judgment in favor of Burditt and the OFD.

Brown appealed, and the Court of Appeals affirmed. The Court of Appeals concluded that Burditt was operating within the scope of his employment for purposes of governmental immunity because volunteer firefighters are actuated by a purpose to serve the fire department from the moment they choose to respond to an emergency call. This is so because when an emergency arises, the OFD's volunteers are expected to respond, if possible, from wherever they are currently located, and volunteers must obey the orders of their commanding officers once they choose to respond to a call.

The Court of Appeals further held that the fact that Burditt violated the traffic code did not mean that he was liable for negligence in his decision to proceed through the intersection. The court held that Burditt's decision to proceed through the intersection against the red light was discretionary, and thus Burditt was immune from liability for negligence based on that decision.

A decision by the Supreme Court could clarify whether government immunity applies to certain public employees, in this case volunteer firefighters, when they violate express statutory prohibitions.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 12, 2013
1:30 p.m.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Waukesha County Circuit Court, Judge Andrew T. Gonring, presiding.

2011AP1176/77 McLeod v. Mudlaff

This certification involves two consolidated cases. The Court of Appeals asks the Supreme Court to decide whether, under Wis. Stat. § 767.313(2), a court has the authority to entertain an action to declare a marriage void after one of the spouses has died.

Some background: Nancy and Luke Laubenheimer married on Aug. 18, 1972. Luke died on Aug. 24, 2001. In 1999, about two years before Luke's death, Nancy executed a will that left her estate to Luke. In the event Luke predeceased her, the bulk of her estate was to go to Luke's three children whom Nancy had never adopted. Nancy never updated her will after Luke's death.

In Jan. 2007, Nancy suffered a stroke and her health began to decline. It is unclear exactly when Nancy's second husband, Joseph McLeod, came into Nancy's life, but by March 2007 Joseph and Nancy were living together.

On Oct. 1, 2008, Nancy suffered another stroke. On Oct. 11, 2008, Nancy's doctors signed a "statement of incapacitation" opining that Nancy was "unable to receive and evaluate information effectively or to communicate decisions," and that she lacked "the capacity to manage health care decisions." The statement of incapacitation activated Nancy's health care power of attorney, which named Nancy's cousin, Diane Kulpa, as her agent for health-care decisions.

On Oct. 13, 2008, Nancy was admitted to a nursing home. On Nov. 3, 2008, Joseph removed Nancy from the nursing home to obtain a marriage license. On Nov. 7, 2008, Joseph and Nancy married. On Jan. 13, 2009, Luke's daughter Patricia Mudlaff filed a petition seeking guardianship for Nancy.

Mudlaff's petition alleged that Nancy "suffers from severe cognitive disability due to several strokes." The petition alleged that Joseph had removed Nancy from the nursing home against medical advice and that Nancy needed a guardian to readmit her to the nursing home. The petition contained an examining physician's report dated Jan. 15, 2009, which opined that Nancy was incompetent and in need of a guardian.

On Jan. 27, 2009, the trial court appointed Nancy's cousin, Diane Kulpa, as a temporary guardian of Nancy's person. The court appointed Nancy's sister as temporary guardian of Nancy's estate. The court found that there was a "reasonable likelihood" that Nancy was incompetent.

Nancy died on Feb. 5, 2009.

On June 9, 2009, Joseph filed a petition for the formal administration of Nancy's estate. Joseph requested that the court appoint him as personal representative of the estate. Joseph filed Nancy's 1999 will with the court but also asserted his Wis. Stat. § 853.12 right to a share of

Nancy's estate. Section 853.12(1) provides that if a testator executed a will prior to marrying the surviving spouse, the surviving spouse is entitled to a share of the estate. The surviving spouse's share is equal to what his or her share would be if the testator died intestate, minus devises made to the testator's children and their issue. *See* § 853.12(2). As Nancy did not have any biological or adoptive children, Joseph argued that he was Nancy's sole heir.

Mudlaff also filed a petition for the formal administration of Nancy's estate. Mudlaff argued that Nancy's marriage to Joseph was invalid on the grounds that Nancy lacked the requisite mental capacity to enter into a marriage, and therefore Joseph had no right to a surviving spouse's share of Nancy's estate.

The trial court denied Mudlaff's petition on the grounds that Wis. Stat. § 767.313(2), quoted below, prohibits a court from annulling a marriage after the death of a party to the marriage. Mudlaff appealed. The Court of Appeals certified the matter to this court.

Wis. Stat. § 767.313(2) provides that "[a] judicial proceeding is required to annul a marriage. A marriage may not be annulled after the death of a party to the marriage." The trial court ruled that, given Nancy's death, § 767.313(2) deprived it of any power to address Mudlaff's petition.

Mudlaff argued on appeal that while the court could not annul Nancy's marriage to Joseph, it did have the power to void the marriage. Mudlaff pointed to various provisions of Wis. Stat. ch. 765 which state that a marriage is invalid if one of the parties was incompetent at the time of marriage. Under Wis. Stat. § 765.21, a marriage entered into in violation of these provisions "shall be void."

Mudlaff argues that because Nancy was not competent when she married Joseph, the marriage was void from its inception, and thus the court could "void" the marriage even though it could not "annul" the marriage.

In its certification, the Court of Appeals traced the historical development of marriage law from statehood to 2005 and examined various terms, including: "valid" marriages, "void" marriages, "voidable" marriages, "annulled" marriages, and "declared null and void" marriages.

In the end, the Court of Appeals asked the Supreme Court to decide how the statutes and the case law should be applied to these consolidated cases.

WISCONSIN SUPREME COURT
MONDAY, FEBRUARY 25, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed an Oneida County Circuit Court decision, Judge Mark Mangerson, presiding.

2010AP2809-CR State v. Lonkoski

This case examines what constitutes interrogation and what constitutes custody under Miranda v. Arizona, 384 U.S. 436 (1966).

Some background: In a decision affirmed by the Court of Appeals, Matthew A. Lonkoski was convicted of recklessly causing great harm to a child and neglecting a child resulting in the child's death. Lonkoski's 10-month-old daughter, Peyton, was found dead by her parents, Lonkoski and Amanda Bodoh. The autopsy determined that Peyton's blood and urine contained a deadly amount of morphine and hydromorphone.

Detectives asked Bodoh to come to the sheriff's department for an interview. Lonkoski drove her to the interview and waited in the lobby while Bodoh was interviewed. After speaking with Bodoh, the officers sent her to another room and brought Lonkoski into the interview room for an interview that was video recorded. Detective Sara Gardner and Lt. Jim Wood interviewed Lonkoski, with Lonkoski sitting in the corner furthest from the door of the interview room.

Wood informed Lonkoski that he was not under arrest. He stated that he had closed the door to the interview room so other people could not hear the interview. For about the first half-hour, the detectives and Lonkoski talked about events since Peyton's death. Then Wood told Lonkoski that an autopsy showed that Peyton died of a morphine overdose. Loknkoski asked the detectives if he was being accused of giving his daughter morphine. The following exchange then occurred:

> Lonkoski: *I want a lawyer. I want a lawyer now. This is bullshit.*
> Wood: *Okay.*
> Lonkoski: *I would never do that to my kid, ever. I wasn't even at the apartment at all except at night. Why are you guys accusing me?*
> Wood: *I didn't accuse you.*
> Gardner: *We were just asking.*
> Lonkoski: *There is this is is is is is is is is insane.*
> Wood: *I have to stop talking to you though 'cause you said you wanted a lawyer.*
> Lonkoski: *Am I under arrest?*
> Wood: *You are now.*
> Lonkoski: *Then I'll talk to you without a lawyer . . . I, I don't want to go to jail . . . .*

Shortly after this exchange, Lonkoski was escorted from the room to smoke a cigarette and use the bathroom. When Lonkoski, Gardner, and Wood returned to the room, Wood read Lonkoski his Miranda rights and Lonkoski agreed to answer further questions. Over approximately two additional hours of questioning, Lonkoski made incriminating statements; specifically, that he and a friend had used morphine – the drug that killed Peyton – around the

time of Peyton's death. Lonkoski was again interrogated four days later and made more incriminating statements.

Lonkoski moved to suppress his statements to police as violative of his Miranda rights. After the trial court denied Lonkoski's motion to suppress, Lonkoski pled guilty to and was convicted of recklessly causing great harm to a child and neglecting a child resulting in the child's death.

The Court of Appeals affirmed the conviction, concluding that Lonkoski voluntarily, knowingly and intelligently waived his Miranda rights.

Lonkoski now asks the Supreme Court to review whether a police officer ceases interrogation as required by Edwards v. Arizona [, 451 U.S. 477 (1981)] where, in response to the interrogated person's invocation of the right to counsel, the officer places the person under arrest. Lonkoski also asks the court to review whether the right to invoke Miranda v. Arizona, 384 U.S. 436 (1966) when custodial interrogation is "imminent or impending" applies where interrogation is ongoing but custody is imminent.

WISCONSIN SUPREME COURT
MONDAY, FEBRUARY 25, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Jeffrey A. Conen, presiding.

2009AP2916-CR State v. Sahs

This case examines whether a defendant's statements to his probation agent, in which he confessed to a new crime of possession of child pornography, were statements compelled as a matter of law in the context of probation.

Some background: Gregory M. Sahs was convicted, following entry of a guilty plea, of one count of possession of child pornography and placed on probation for three years. The state learned of this crime only because of statements Sahs made to his probation agent while Sahs was on probation for an earlier offense.

Before being administered a polygraph test, Sahs admitted to his probation agent that he kept a computer at the home of a friend and had accessed child pornography. Sahs acknowledged this confession would result in revocation.

The agent contacted police, and on Jan. 24, 2007, detective Jacque Chevremont retrieved the computer from the friend's home. The following day, Chevremont met with Sahs while he was in custody and read him his Miranda rights. Sahs indicated he understood. Sahs waived his right to an attorney and gave a statement admitting to downloading child pornography while on probation. Sahs's probation was revoked and he began serving an 18-month revocation sentence.

Meanwhile, police obtained a search warrant and confirmed there was child pornography on the computer. On June 26, 2007, Sahs agreed to speak with Chevremont and again waived his Miranda rights. He admitted to making statements to his probation agent regarding downloading child pornography while on probation.

On June 28, 2008, Sahs was charged with two counts of possession of child pornography, contrary to Wis. Stat. § 948.12(1m) and (3)(a), for the contents found on his computer. Sahs pled not guilty to both counts.

On Oct. 27, 2008, Sahs filed two motions to exclude this evidence. Sahs moved to suppress the statements he made to his probation agent on the grounds that the statements were compelled, incriminating and testimonial. Sahs claims that his oral confession to his agent was written down on a state Department of Correction's form. Sahs stated that the probation agent checked a box on this form, indicating that Sahs was required to provide the information, but it could not be used against him in a criminal proceeding.

Sahs also moved to suppress evidence of child pornography discovered on the computer and the ensuing statements made to police investigators on the theory that this evidence was obtained as a direct consequence of the compelled statements made to the agent.

The trial court denied Sahs's motions and Sahs entered a guilty plea. He appealed, and the Court of Appeals affirmed the trial court's determination that Sahs's statements were not compelled, noting that the mere fact that an individual is required to appear and report truthfully to his or her probation agent is insufficient to establish compulsion. *See* State v. Mark, 2006 WI 78, ¶25, 292 Wis. 2d 1, 718 N.W.2d 90 (citing Minnesota v. Murphy, 465 U.S. 420 (1984)).

Because the circuit court found that the statements were voluntary, the state maintains that Sahs did not meet his burden in showing that his initial statement was compelled.

Sahs asks the Supreme Court to review whether the Court of Appeals erred in denying his appeal based on his statement to the probation agent that was allegedly not in the record, and whether the trial court erred in concluding that defendant's statement to the probation agent was not coerced.

WISCONSIN SUPREME COURT
MONDAY, FEBRUARY 25, 2013
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), arising from a Racine County Circuit Court decision, Judge Eugene A. Gasiorkiewicz, presiding.

2011AP2864-CRAC State v. Johnson

This child sex assault case reaches the Supreme Court after an interlocutory appeal involving pretrial discovery orders by the trial court. The Supreme Court reviews several issues and underlying questions arising from the defendant's request to view therapy records of the girl he is accused of assaulting. The case is stayed in the trial court, pending a decision by the Supreme Court.

Among the issues raised by the state in its petition for review:

- Whether defendants have a constitutional right to disclosure of privately-held privileged records.
- If defendants have such a constitutional right, does that right trump privilege statutes?
- If defendants have such a constitutional right, did the defendant in this case establish a constitutional right to disclosure of the girl's therapy records?

Some background: The state charged Samuel Curtis Johnson III in March 2011 with repeated sexual assault of a girl when she was between the ages of 12 and 15 years old. The state alleged that Johnson touched the girl's breasts, buttocks, and vagina under her clothes. There appears to be no physical evidence of sexual assault, the Court of Appeals wrote in its discussion of the case.

Johnson moved the trial court for "in camera" inspection (i.e., the trial judge's inspection in chambers) of the girl's therapy records. The state argued that Johnson had not made the requisite preliminary showing for in camera inspection. In particular, the state said that Johnson failed to show that any relevant records existed, or that the girl was suffering from a mental illness at the time of the alleged assaults that would affect her ability to perceive the alleged events or relate the truth.

Through her counsel, the girl informed the court that she had reviewed the facts set forth in Johnson's motion seeking in camera inspection of her records and that those facts were accurate.

The trial court granted Johnson's motion pursuant to State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) and State v. Green, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. The trial court found that the reasons and factual basis proffered by Johnson met the requisite requirement for relevancy and materiality.

The girl's counsel then notified the court that the girl would not consent to in camera inspection of her therapy records, and that she was invoking her "absolute statutory privilege" to refuse to disclose her records. Counsel indicated that she the girl understood the possible impact her decision would have on the state's prosecution of Johnson.

The state sought an order from the court compelling the production of the girl's therapy records regardless of her invocation of privilege. The girl objected.

Johnson and the girl argued that the only remedy available was for the trial court to bar her from testifying until such time as she consents to the release of her privileged records. The state responded that the physician-patient privilege was not absolute and the appropriate remedy was for the trial court to issue a subpoena compelling the release of the records directly to the court for in camera review.

The trial court considered both options and found neither appropriate. The court instead issued a six-part order:

1. The court would honor the girl's assertion of the privilege; and
2. allow the girl to testify; and
3. inform the jury that she had been ordered to release her therapy records for in camera inspection; and
4. inform the jury that the girl had a privilege to refuse the production of her records; and
5. inform the jury that she had, in fact, refused the court's order; and
6. inform the jury that, as a result of her refusal, a presumption exists that the contents of the records would have been helpful to the defense.

The state and Johnson both petitioned the Court of Appeals for leave to appeal. The state sought review as to whether Johnson made a sufficient showing under Shiffra and Green to obtain an in camera inspection. The state also sought review of the trial court's refusal to compel the production of the girl's therapy records following her invocation of privilege. Johnson sought review of the trial court's order allowing the girl to testify, despite her refusal to release her therapy records for in camera review.

The Court of Appeals granted leave to appeal, and ultimately: (1) affirmed the trial court's order for in camera inspection; (2) reversed the trial court's order allowing the girl to testify while also refusing to release her records; and (3) remanded for further proceedings consistent with the court's opinion.

The Court of Appeals held that the therapy occurred during the time period of the alleged assaults made it reasonably likely the records contained relevant information necessary to a determination of guilt or innocence.

In a dissent, Chief Judge Richard S. Brown, District II Court of Appeals, agreed with the majority that Johnson made the requisite preliminary showing required for in camera review, but disagreed that Shiffra necessarily requires suppression of the girl's testimony.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 26, 2013
9:45 a.m.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Manitowoc County Circuit Court, Judge Jerome L. Fox, presiding.

2012AP665 Manitowoc Co. v. Samuel J.H.

In this certification, the Supreme Court examines a possible inconsistency in provisions of Chpt. 51, the state's involuntary commitment law.

More specifically, the Court of Appeals asks whether § 51.35(1)(e) mandates a hearing within 10 days for all transferred patients, including those transferred for medical reasons under § 51.35(1)(e)1., or whether the mandate applies only to those transferred due to a violation of the conditions of outpatient placement as set forth in § 51.35(1)(e)2.-5.

Some background: On Sept. 22, 2011, Samuel J.H., who was subject to an involuntary commitment order under ch. 51, Stats., was transferred from an outpatient facility to inpatient care. He was given a written notice of his rights under § 51.35(1)(e)1. Samuel objected to the transfer, and counsel was appointed for him and a petition for review of transfer was filed. Relying on the Court of Appeals' holding in Fond du Lac County v. Elizabeth M.P., 2003 WI App 232, ¶¶26, 28, 267 Wis. 2d 739, 672 N.W.2d 88, Samuel argued that he was entitled to a hearing within 10 days of transfer. He also asked to be returned to outpatient status.

A hearing was held on Samuel's petition on Dec. 19, 2011. During the hearing the circuit court commented that it found the language in Elizabeth M.P. "at least mildly confusing." The circuit court concluded that a threshold question presented was whether Samuel was transferred due to a rule violation, and the court invited testimony on the reason for Samuel's transfer.

Samuel's social worker said Samuel had been becoming increasingly psychotic and his behavior had become out of control to the point where he was totally delusional and punching holes in the wall. The social worker testified Samuel did not directly threaten anyone but he reportedly made a general threatening statement to the effect of "we're going to hell and somebody needs to get shot." The social worker said Samuel said things that did not make sense and was doing a lot of nonsensical chanting. The social worker said Samuel was not transferred because of a threat or act to harm himself or others.

The circuit court concluded Samuel was transferred for medical reasons and thus was not entitled to the mandatory hearing under § 51.35(1)(e)2. The circuit court acknowledged that although Elizabeth M.P. expressly addressed § 51.35(1)(e)2. when discussing a mandatory hearing within 10 days, it "threw the net over everything" in saying more broadly that a transfer under § 51.35(1)(e) requires a hearing within 10 days. The circuit court concluded the broad statement in Elizabeth M.P. was not consistent with the language of the statute.

In its certification, District II Court of Appeals says the issue presented in Elizabeth M.P. was whether the circuit court had jurisdiction to transfer the subject to inpatient status when judicial review of the county's decision to transfer her was not held within 10 days as required

by § 51.35(1)(e)3. District II says the Elizabeth M.P. court blurred the distinction between the two types of transfer.

District II says the inconsistency in Elizabeth M.P. was noted both by the circuit court and by the county, and while District II says the inconsistency is apparent to it as well, only the Supreme Court may address it.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 26, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a Outagamie County Circuit Court decision, Judge Michael W. Gage, presiding.

2012AP99 Outagamie Co. v. Melanie L.

This case examines the statutory standard for determining whether a person is competent to refuse medication and treatment for mental illness.

More specifically, the Supreme Court is asked whether Outagamie County failed to prove that Melanie L. was incompetent to refuse medication and treatment when the evidence showed that Melanie recognized she is mentally ill and needs medication.

Some background: In 2009, when Melanie was living with her mother in Michigan, she asked her mother to take her to the hospital because she was anxious, having strange thoughts, and was unable to eat or sleep. She was hospitalized for nine days and was diagnosed with major depressive disorder with psychotic features. She was prescribed Risperdal. Melanie stopped taking the medication due to side effects and because she could not afford to pay for it.

Melanie moved to Wisconsin in 2010. She got her own apartment and started taking classes to pursue a nursing career. In February of 2011, Melanie was detained for mental health treatment after her boyfriend took her to the hospital. Melanie told an examiner psychiatrist that she felt similar to when she had the episode two years earlier in Michigan. Melanie was hospitalized for two weeks and diagnosed with psychotic disorder. She was treated with medication, including Seroquel, which she said was effective and asked later to be prescribed again.

At the probable cause hearing following the emergency detention, Melanie agreed to the probable cause findings necessary to continue her detention and she agreed to the entry of a temporary medication order. At a final hearing on Feb. 18, 2011, Melanie stipulated to the entry of a six-month commitment order and an involuntary medication order. During the six-month commitment, Melanie had been under the care of the county's psychiatrist, Dr. Milagros Cuaresma Ambas.

About a month before the six-month commitment was to expire, the county filed a petition seeking a 12-month extension and another order requiring Melanie to take prescribed medications. A hearing was held on the petition on Aug. 17, 2011. The county's case manager, Kate Siebers, who had never met with Melanie in person and had been assigned to her case for two months, testified Melanie lacked insight into her mental illness and the purpose of treatment.

A court-appointed examiner, Dr. Jagdish Dave, conceded Melanie could express an understanding of the risks and benefits of psychotropic medication because of her educational background, but she was not able to apply that understanding "to her advantage."

The circuit court ordered an extension of the mental health commitment and an involuntary medication order. Melanie appealed, and the Court of Appeals affirmed.

On appeal, Melanie objected to the involuntary medication order and argued the county failed to meet its burden of proving she was not competent to refuse medication.

Melanie argued Dave's opinion that she was not competent to refuse medication did not fit the statutory standard of incompetency because Dave testified she was incapable of applying an understanding "to her advantage" instead of "to . . . her mental illness . . . in order to make an informed choice." Dave said Melanie did not resume taking medication after suffering a miscarriage and did not voluntarily attend follow-up care.

Melanie also argued the evidence supported a finding that she can apply an understanding of the advantages, disadvantages, and alternatives to her mental illness. The Court of Appeals rejected Melanie's argument that the expert must recite the specific words of the statute in order for the evidence to be sufficient. The Court of Appeals said although Melanie requested Seroquel, she returned to Ambas to make that request because the county prompted her to return.

Melanie argues that this case presents the opportunity for this court to interpret and apply the competency standard set forth in § 51.61(1)(g)4, governing the right to refuse medication and treatment. She says that statute and statutes with virtually identical language apply to individuals who are under a mental health commitment and to those who are committed to a treatment facility or receiving services for developmental disabilities, alcoholism, or drug dependency, including commitments made under ch. 55 and to criminal defendants found incompetent or not guilty by reason of mental disease or defect, under ch. 971.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 26, 2013
1:30 p.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case is a prosecutor in Racine County.

2011AP1049-D OLR v. Sharon A. Riek

In this case, the Supreme Court will determine whether Sharon A. Riek, an assistant district attorney in Racine County, violated the code of ethics for lawyers, and if so, the penalty. More broadly, a decision in this case could clarify standards that determine when Wisconsin prosecutors must reveal discovered material favorable to the defense. In the process, the Court may determine whether Wisconsin Supreme Court Rule 20:3.8 (f) includes a "Brady" analysis, under Brady v. Maryland, 373 U.S. 83 (1963).

The underlying criminal case:

In 2008, Tyrone Smith was arrested, after a traffic stop, for possession of marijuana discovered in the vehicle during the stop. At the time, Smith was on extended supervision for possession with intent to deliver cocaine. Isaiah Simpson was a passenger in the car during the stop.

On Aug. 22, 2008, Simpson confessed to a probation agent that the marijuana found in the vehicle belonged to him, not Smith. The agent told Simpson to make a similar report to the Racine County District Attorney's Office. Smith's attorney Mark Lukoff was made aware of Simpson's confession to the agent shortly after Simpson made it. Assistant District Attorney Sharon A. Riek was assigned to prosecute Smith.

After a preliminary hearing, Lukoff filed a Demand for Discovery and Inspection with the court and served it upon Riek. to "[d]isclose to defendant any exculpatory evidence." See § 971.23(1)(g).

Sometime after Sept. 19, 2008, Lukoff received a copy of Simpson's statement to the agent as part of the materials for Smith's revocation. On Oct. 15, 2008, at Smith's revocation hearing, the agent entered Simpson's confession into evidence. Smith based his defense at the revocation hearing on Simpson's confession.

On Oct. 27, 2008, the administrative law judge (ALJ) declined to revoke Smith. The agent appealed the ALJ's decision, writing that Simpson failed to go to the district attorneys' office and to report that the marijuana was his.

In early November 2008, Simpson did go to the Racine County District Attorney's Office, where he met with District Attorney Michael E. Nieskes and informed Nieskes that the marijuana belonged to him, not to Smith. As a result of that November meeting, Nieskes wrote an unsigned and undated note that stated: "Isiah Simpson 1010 Park Ave 637-9029 states that the dope is his not Tyrone Smiths."

According to his subsequent affidavit, Nieskes verbally told Riek about his meeting with Simpson and gave her the note later that morning. Riek does not recall receiving the note, but she does recall being advised of the information contained in the note in November of 2008. Riek did not immediately disclose either the fact of the conversation or the note to the defense. Riek did ask the sheriff's department to investigate Simpson's claim.

On March 26, 2009, while preparing for trial, Lukoff personally met with Simpson. At this meeting, Lukoff learned from Simpson that Simpson had met with Nieskes. Accordingly, that day, Lukoff faxed a letter to Riek, asking for a copy of the information Simpson provided to Nieskes.

The next day, March 27, 2009, four days before trial, Riek sent Lukoff a copy of the note. Her cover letter included the statement that, "[a]s I indicated to you earlier today, based upon this note, I sent a request to the Racine County Sheriff's Department to have them follow up on this information and Isiah Simpson declined to cooperate and provide a statement."

On March 30, 2009, Lukoff added Nieskes as a defense witness and filed a Motion for a Special Prosecutor. When Simpson arrived for Smith's trial on March 31, 2009, Riek had a law enforcement officer interview Simpson. Simpson admitted to the law enforcement officer that the marijuana was his, not Smith's. Riek then moved to dismiss Smith's case. The charges were dismissed.

The lawyer regulation case:

On May 9, 2011, the OLR filed a disciplinary complaint against Riek alleging that by failing to promptly provide the defense with exculpatory information concerning a third party's admission of possessing marijuana the defendant was charged with possessing, Riek violated SCR 20:3.8(f)(1) and Wis. Stat. § 971.23(1)(h), enforceable via SCR 20:8.4(f). The OLR sought a public reprimand and imposition of costs.

On Aug. 6, 2012, the referee assigned to the case, Michael Dubis, issued a report granting summary judgment in favor of Riek, concluding that Riek did not violate either SCR 20:3.8(f)(1) or § 971.23(1)(h). The referee stated that the exculpatory information in the Simpson note was already in possession of the defense at least as early as Oct. 15, 2008, some five months prior to trial. Notably, the referee stated that SCR 20:3.8 and § 971.23(1)(h) "must include Brady's materiality standard."

In Brady, the U.S. Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

The referee concluded, and Riek supports the contention that SCR 20:3.8 must incorporate Brady's materiality requirement, as well as the requirement that the exculpatory information be in the exclusive possession of the state to trigger disclosure obligations.

The OLR contends that SCR 20:3.8 imposes a higher standard on a prosecutor than Brady requires**.** The OLR points to the plain language of the Supreme Court Rule, an ABA Formal Opinion, and a case from North Dakota in support of its position.